

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LAWYERS' COMMITTEE FOR CIVIL
RIGHTS OF SAN FRANCISCO BAY
AREA,

Plaintiff,

v.

No. C 07-2590 PJH

**ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

UNITED STATES DEPARTMENT OF
THE TREASURY,

Defendant.

Defendant's motion for summary judgment came on for hearing before this court on July 23, 2008. Plaintiff Lawyers' Committee for Civil Rights of San Francisco Bay Area ("LCCR") appeared through its counsel, Thomas Burke. Defendant United States Department of Treasury ("defendant" or "Treasury") appeared through its counsel, Peter Wechsler. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court DENIES defendant's motion for summary judgment.

BACKGROUND

This is an action brought under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Plaintiff LCCR seeks declaratory and injunctive relief, requiring Treasury to disclose numerous documents.

Specifically, on August 16, 2005, LCCR submitted a FOIA request to Treasury, which included ten requests related to the Specially Designated Nationals List (SDN list)

that is maintained and administered by Treasury's Office of Foreign Assets Controls ("OFAC"). OFAC's SDN list is a publicly available list of suspected terrorists, drug traffickers, and other "specially designated nationals," and includes individuals, banks, companies, and other entities deemed to be a threat to national security. Private businesses such as banks, mortgage companies, landlords, and employers screen potential customers and applicants against the SDN list. If an applicant's name is on the list – or is similar to a name on the SDN list – then an alert is generated, and businesses and/or employers may refuse to conduct business or employ the customer or applicant. The list casts a fairly wide net, and includes common names like Sanchez, Gonzalez, Ali, and Hussein.

In its FOIA request, LCCR sought disclosure of the following OFAC records from 2000 to the present:

- (1) The number and nature of inquiries made to the OFAC compliance hotline by companies regarding a possible name match to the SDN list or other watchlist;
- (2) The distribution of calls to the OFAC compliance hotline based on industry (including but not limited to banks, travel/tourism agencies, insurance companies, credit reporting agencies, nonprofit organizations, and money service businesses);
- (3) The number of calls received by the OFAC compliance hotline that resulted in an actual name match to the SDN list or other watchlist;
- (4) The number and nature of inquiries from companies/individuals about a credit report submitted by an applicant stating that the applicant might be on a government watchlist;
- (5) The number and nature of complaints from individuals whose names were flagged as similar to a name on the SDN list or other watchlist and any OFAC responses to such complaints;
- (6) The number and nature of complaints from individuals whose credit reports contained an alert regarding a possible name match to the SDN list or other watchlist, and any OFAC responses to those complaints;
- (7) Policies or measures taken to protect the civil rights and privacy interests of individuals whose names are flagged as similar to a name on the SDN list or other watchlist;
- (8) Procedures for individuals to remove their names from the SDN list or other watchlist or to establish that they are not actually on the

1 watchlist;

2 (9) Policies and procedures used by OFAC to determine whether an
3 individual about whom the agency has received an inquiry is actually
the same person identified on a government watchlist; and

4 (10) Policies and procedures used by OFAC once it has determined that an
5 individual is actually on a government watchlist.

6 On August 29, 2005, an OFAC director acknowledged receipt of LCCR's request,
7 and notified LCCR that it was experiencing a substantial backlog of FOIA requests, and
8 that its response would be delayed. LCCR subsequently filed a complaint with this court in
9 May 2007, asserting one FOIA claim, seeking injunctive relief requiring Treasury to release
10 the requested records and a declaration that Treasury had violated FOIA. At the time that
LCCR filed its complaint, Treasury had not responded to its FOIA request.

11 Shortly thereafter, on July 20, 2007, Treasury responded to LCCR's FOIA request,
12 and produced several documents it deemed responsive. Treasury then filed a motion to
13 dismiss the complaint on July 27, 2007, arguing that LCCR's complaint should be
14 dismissed for lack of subject matter jurisdiction given its July 20, 2007 response to LCCR's
15 FOIA request. On October 3, 2007, LCCR filed its opposition to Treasury's motion,
16 contending that its FOIA claim was not mooted by Treasury's response because both
17 Treasury's search and its response were inadequate. LCCR also requested discovery
18 regarding Treasury's search and response. Subsequently, on October 18, 2007, this court
19 held a case management conference, at which it noted that Treasury's motion to dismiss
20 was mooted by plaintiff's challenge to the adequacy of the search, and set a further briefing
21 schedule for the motion which would be treated as one for summary judgment. Treasury
22 filed a reply on October 31, 2007, which was accompanied by the Third Canter Declaration
23 addressing the search conducted by OFAC. LCCR filed a sur-reply on November 14,
24 2007.

25 The court found the Third Canter Declaration submitted by Treasury in support of its
26 motion inadequate because it did not sufficiently explain and describe OFAC's search for
27 responsive documents at the hearing on the motions. The court noted that it was not
28

1 sufficient for Treasury to simply assert that OFAC division directors were provided with a
 2 list of plaintiff's FOIA requests and asked to search for responsive documents.
 3 Accordingly, the court ordered Treasury to submit a supplemental declaration regarding the
 4 adequacy of the search, and deferred ruling on the parties' motions until it had reviewed the
 5 supplemental declaration. In response, Treasury filed the Fourth Canter Declaration on
 6 January 11, 2008.

7 On February 14, 2008, the court issued its order granting in part and denying in part
 8 Treasury's motion for summary judgment and denying plaintiff's motion for discovery. The
 9 court also entered judgment, as it turns out, precipitously. Although the court found several
 10 of LCCR's requests incomprehensible and/or improper, the court required Treasury to
 11 disclose certain documents, as responsive to LCCR's FOIA requests nos. 5 and 6, which
 12 asked for records regarding:

- 13 (5) The number and nature of complaints from individuals whose names
 14 were flagged as similar to a name on the SDN list or other watchlist
 and any OFAC responses to such complaints;
- 15 (6) The number and nature of complaints from individuals whose credit
 16 reports contained an alert regarding a possible name match to the
 SDN list or other watchlist, and any OFAC responses to those
 17 complaints

18 The documents that the court ordered be disclosed included some in electronic form,
 19 specifically: (1) the inquiries and/or complaints associated with six data entries revealed by
 20 OFAC's search of the electronic database for calls to the congressional liaison; (2) the
 21 letters associated with 67 data entries resulting from OFAC's search of the FACDB; and (3)
 22 53 entries resulting from OFAC's search of the electronic database for its website.
 23 Additionally, the court ordered that delisting petitions, which are applications (in paper form)
 24 filed by an individual acknowledging that his or her name is on the SDN list and seeking to
 25 remove his or her name from the SDN list, be disclosed.

26 On March 21, 2008, both parties filed documents with the court notifying it that a
 27 dispute had arisen regarding Treasury's redaction of certain documents subject to
 28 disclosure by the court's February 14, 2008 order. On March 25, 2008, the court held a

1 telephonic case management conference and issued an order vacating the judgment and
2 setting a briefing schedule. It ordered the parties to meet and confer regarding the
3 redacted and withheld documents. Assuming the parties were unable to resolve the
4 dispute as to the withheld documents, the court ordered Treasury to file a motion for
5 summary judgment and set a briefing schedule. The court further determined, and the
6 parties agreed, that no further administrative exhaustion regarding Treasury's claimed
7 exemptions was necessary prior to the motion for summary judgment.

8 Treasury's motion for summary judgment as to exemptions it claims under FOIA with
9 respect to 346 delisting petitions followed, and is currently before the court. Following the
10 July 23, 2008 hearing, the court took the motion under submission, but ordered Treasury to
11 submit three randomly selected delisting petitions in order to ascertain whether certain
12 delisting petitions submitted by LCCR in conjunction with its opposition to the motion were
13 representative of the category of delisting petitions. See Burke Decl., Exhs. A and B; Kabat
14 Decl., Exh. A.¹ Specifically, the court ordered Treasury to submit three delisting petitions,
15 including the first petition belonging to an applicant with a name beginning with "A," the last
16 applicant with a name beginning with "N," and the first applicant with the name beginning
17 with "R."

18 Treasury submitted the petitions, which were not disclosed to LCCR, to the court on
19 July 29, 2008. The "petitions" each consisted of one-page letters from individuals to OFAC,
20 and were very dissimilar to the exhibits provided by LCCR. They appeared to the court to
21 be incomplete. Additionally, it was apparent to the court that Treasury had misunderstood

22
23 ¹At the hearing, the court expressly noted that it was *not* requesting submission of the
24 sample petitions from Treasury for the purpose of conducting an *in camera* review, such as
25 that expressly prohibited by the Ninth Circuit. *Wiener v. FBI*, 943 F.2d 972, 977-79 (9th Cir.
26 1991) (holding that the submission of a Vaughn index or more detailed affidavits should occur
before any *in camera* review of the delisting petitions takes place). Rather the samples were
intended to be used as comparators given Treasury's objections that the samples submitted
by plaintiff were not representative.

27 The court notes that although Treasury has labeled its post-hearing July 29, 2008, and
28 August 6, 2008 submissions as "in camera" submissions, the court has not conducted the type
of in camera review detailed in *Wiener*.

its request to provide sample petitions by erroneously limiting the petitions submitted to the court to *individual* - as opposed to entity - applicants. Accordingly, on July 31, 2008, during a further telephonic conference with the parties, the court clarified that its request pertained to petitions submitted by *entities* as well as individuals. The court ordered Treasury to submit three random *entity* delisting petitions, including the first entity with the name beginning with "A," the last entity with the name beginning with "N," and the first entity with the name beginning with "R." The court also requested that Treasury confirm that the July 29, 2008 submissions that it provided the court constituted complete petitions, and to update those petitions as necessary.

Accordingly, on August 6, 2008, Treasury submitted three additional delisting petitions from entities. One of those delisting petitions similarly consisted of a one-page letter to OFAC. Although that sample suggests prior related correspondence, Treasury stated that "no [supporting] documents accompanied" that delisting petition. Treasury also confirmed that there were no supporting documents for the individual delisting petitions that it submitted July 29, 2008.

Treasury did, however, submit supporting documents for the remaining two entity delisting petitions. The majority of those documents were untranslated, and appear to be in German and/or Russian. Accordingly, the court, fluent in neither, was unable to ascertain the contents of the untranslated documents. Like the three individual delisting petitions submitted by Treasury, the three entity delisting petitions differ substantially from those submitted as exhibits by LCCR.

DISCUSSION

A. Legal Standards

1. The Statute

The pertinent statute, 5 U.S.C. § 552(b) provides that:

(b) This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national

defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

. . . .

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected

by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.²

2. FOIA Exemptions and Judicial Review Generally

As a general rule, all FOIA determinations should be resolved on summary judgment. See *Nat'l Wildlife Fed'n v. U.S. Forest Service*, 861 F.2d 1114 (9th Cir. 1988); O'Reilly, Federal Information Disclosure, § 8:21 (2007 Suppl.) (numerous citations); *Sakamoto v. U.S. Environmental Protection Agency*, 443 F.Supp.2d 1182, 1188 (N.D. Cal. 2006).

FOIA reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Lane v. Department of Interior*, 523 F.3d 1128, 1137 (9th Cir. 2008) (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976)). Congress set forth nine categories of documents that are exempt from FOIA's disclosure requirement. 5 U.S.C. § 552(b)(1)-(9). Unlike the broadly construed disclosure provisions of FOIA, its statutory exemptions "must be narrowly construed." *Lion Raisins v. United States Dept. of Agriculture*, 354 F.3d 1072, 1079 (9th Cir. 2004) (citations omitted). The agency resisting public disclosure has "the burden of proving the applicability of an exception." *Minier v. Central Intelligence Agency*, 88 F.3d 796, 800 (9th Cir. 1996). "That burden remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document." *United States Dep't. of State v. Ray*, 502 U.S. 164, 173 (1991).

Because the agency has sole access to the withheld documents, the ordinary rules of discovery do not operate in a FOIA case to "give each party access to the evidence upon which the court will rely in resolving the dispute between them." *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1175 (9th Cir. 2000) (citing *Wiener*, 943 F.2d at 977). "This lack of knowledge by the party seeking disclosure seriously distorts the

²The exemptions claimed by Treasury are italicized.

1 traditional adversary nature of our legal system[].' " *Id.* (quoting *Vaughn v. Rosen*, 484 F.2d
2 820, 824 (D.C. Cir. 1973)). To correct this imbalance, the courts devised the Vaughn index
3 requirement, which may be imposed on government agencies seeking to withhold
4 documents requested under FOIA. *Id.*

5 The court may rely solely on government affidavits in resolving a summary judgment
6 motion as to exemptions "so long as the affiants are knowledgeable about the information
7 sought and the affidavits are detailed enough to allow the court to make an independent
8 assessment of the government's claim." *Lane*, 523 F.3d at 1135 -1136 (quoting *Lion*
9 *Raisins*, 354 F.3d at 1079). "If the affidavits contain reasonably detailed descriptions of the
10 documents and allege facts sufficient to establish an exemption, 'the district court need look
11 no further.' " *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987) (quoting *Church of*
12 *Scientology of Calif. v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1979)).

13 However, in camera inspection may be appropriate if the "preferred alternative to in
14 camera review – government testimony and detailed affidavits – has first failed to provide a
15 sufficient basis for a decision." *Lane*, 523 F.3d at 1136. In *Church of Scientology*, the
16 Ninth Circuit held that the district court's in camera viewing of the disputed documents, in
17 combination with "somewhat conclusory" affidavits, constituted an adequate factual basis,
18 because the "small number of documents requested, and their relative brevity, made these
19 cases appropriate instances for exercise of the district court's inspection prerogative." *Id.*
20 (discussing *Church of Scientology*, 611 F.2d at 743).

21 In camera inspection, however, is "not a substitute for the government's burden of
22 proof, and should not be resorted to lightly," due to the ex parte nature of the process and
23 the potential burden placed on the court. *Lane*, 523 F.3d at 1136. In camera review is not
24 to be used as a substitute for or an inadequate Vaughn index. *Powell v. United States*
25 *Dept. of Justice*, 584 F.Supp. 1508, 1512-1513 (N.D. Cal. 1984). Moreover, since the
26 exemptions to FOIA are intended "to relieve the district courts of potentially onerous in
27 camera inspections of documents," *MacPherson v. IRS*, 803 F.2d 479, 482 (9th Cir.1986),
28

1 district courts need not and should not make in camera inspections where the government
2 has sustained its burden of proof on the claimed exemption by public testimony or
3 affidavits. *Lewis*, 823 F.3d at 378 (government testimony and detailed affidavits are the
4 "preferred alternative" to in camera review).

5 **B. Treasury's Motion**

6 At the outset, the court notes that Treasury utilizes a fair amount of space in its
7 motion papers addressing issues that have already been resolved by the court in its
8 February 14, 2008 order. First, Treasury devotes several pages to the adequacy of its
9 search for responsive documents, an issue which the court previously resolved in
10 Treasury's favor. See February 14, 2008 Order at 15-16 ("Based upon [the Third and
11 Fourth Canter Declarations], the court concludes that Treasury's search was indeed
12 reasonably calculated to uncover all relevant documents as to all FOIA requests, and
13 GRANTS Treasury summary judgment on this basis."). The court finds it unnecessary to
14 revisit the issue.

15 Second, notwithstanding the court's February 14, 2008 order, Treasury argues that
16 LCCR is *not* entitled to the delisting petitions because its FOIA request and complaint
17 targets only "false matches" or mistakes with respect to the SDN list. See Reply at 1-3 &
18 n.1. Treasury asserts that the delisting petitions "are not responsive to [LCCR's] FOIA
19 request" because delisting petitions are in fact *not* communications concerning a false
20 match, but are instead "applications *acknowledging* that persons *are included* on the SDN
21 list and requesting that their names be removed." Reply at 3 n.1, 2. The court, however,
22 declines to reconsider its prior conclusion that even though LCCR's FOIA requests 5 and 6
23 may have been inartfully written, liberally construed, the requests encompass the delisting
24 petitions. See February 14, 2008 Order at 15.

25 Additionally, although Treasury's opening motion papers address its redaction of
26 certain documents that this court ordered Treasury to disclose, those documents are no
27 longer at issue since LCCR concedes in its opposition that the redactions were appropriate.
28

1 Accordingly, the only issue remaining concerns Treasury's claimed exemptions with
2 respect to the delisting petitions.

3 **1. Absence of a Vaughn Index**

4 Courts generally rely on a Vaughn index in ruling on claimed exemptions to FOIA.
5 *Lewis*, 823 F.2d at 380 (citing *Vaughn*, 484 F.2d at 827). The Vaughn "index functions to
6 restore the adversary process to some extent, and to permit more effective judicial review
7 of the agency's decision." *Wiener*, 943 F.2d at 977. To fulfill its purpose, a Vaughn index
8 must "identify[] each document withheld, the statutory exemption claimed, and [provide] a
9 particularized explanation of how disclosure of the particular document would damage the
10 interest protected by the claimed exemption." *Id.* at 977.

11 Vaughn indices, however, are not required in all FOIA cases. *Id.* at 978 n. 5. For
12 example, when the affidavit submitted by an agency is sufficient to establish that the
13 requested documents should not be disclosed, a Vaughn index is not required. *Minier*, 88
14 F.3d at 804 (citing *Lewis*, 823 F.2d at 380). Additionally, when a claimed FOIA exemption
15 is based on a general exclusion, such as Exemption 7(A)'s criminal investigation exclusion,
16 which is dependent on the category of the requested records rather than the individual
17 subject matters contained within each document, a Vaughn index is unnecessary. See
18 *Lewis*, 823 F.2d at 380; see also *Campbell v. Dept. of Health & Human Services*, 682 F.2d
19 256, 265 (D.C. Cir. 1982) (government is required to provide affidavits but not Vaughn
20 index to establish applicability of Exemption 7(A)).

21 In cases where a Vaughn index is not required, an agency "may meet its burden by
22 submitting a detailed affidavit showing that the information logically falls within the claimed
23 exemptions." *Minier*, 88 F.3d at 800 (internal quotation marks and citation omitted). "In
24 evaluating a claim for exemption, a district court must accord 'substantial weight' to
25 [agency] affidavits, provided the justifications for nondisclosure are not controverted by
26 contrary evidence in the record or by evidence of [agency] bad faith." *Id.* Because the court
27 and the plaintiff do not have the opportunity to view the documents themselves, the
28

1 submission must be “detailed enough for the district court to make a *de novo* assessment
2 of the government's claim of exemption.” *Id.* (citing *Maricopa Audubon Soc'y v. United*
3 *States Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997)).

4 Here, Treasury determined that there were 346 delisting petitions, 291 of which were
5 still “pending” and 55 which were “closed” or “concluded.” 5th Canter Decl. ¶ 25. Treasury
6 then reviewed 102 of the petitions, which it contends constituted a “representative sample,”
7 to determine which FOIA exemptions if any applied to the petitions.³ *Id.* at ¶ 24. Based on
8 this review, Treasury concluded that eight exemptions applied to the delisting petitions:
9 Exemptions 2, 3, 4, 6, 7(A), 7(C), 7(D), and 7(F).⁴ Treasury, however, did not submit a
10 Vaughn index with respect to the delisting petitions.

11 It asserts that it has not submitted a Vaughn index in this case because the alleged
12 exemptions apply *categorically*, or in other words, to the entire category of delisting
13 petitions, and also because the Fifth Canter Declaration sufficiently establishes that the
14 petitions need not be disclosed.⁵ The Fifth Canter Declaration is described in more detail
15 below in conjunction with the court's discussion of each of the asserted exemptions.

17 ³OFAC has not explained *why* the 102 petitions it reviewed were representative of the
18 346 petitions as a whole; nor has it explained whether those 102 petitions were open or closed
19 petitions.

20 ⁴Although it is not clear from its papers, Treasury clarified at the July 23, 2008 hearing
21 that it is not asserting Exemption 5 with respect to the delisting petitions.

22 ⁵Plaintiffs, in their opposition, have not presented a formal argument regarding the
23 necessity of a Vaughn index generally, but have implied that one is necessary in this case in
24 several places throughout their brief. See, e.g., Oppos. at 1 (“[w]ithout providing LCCR or this
25 Court with a Vaughn index or a particular showing of the allegedly sensitive information that
26 purportedly appears in each of the individual petitions, OFAC asserts a variety of exemptions
27 to releasing *any portion of any* delisting petitions regardless of the particular circumstances
28 raised in each”); Oppos. at 2 (contending that OFAC made a “wholly inadequate and improper
evidentiary showing” in support of its claimed exemptions); Oppos. at 14 (“OFAC is
impermissibly and generically categorizing the delisting petitions as a whole and offering no
Vaughn index or particularized showing”); Oppos. at 25 (“OFAC's failure to provide a Vaughn
index or make a particularized showing as to the contents of the individual delisting petitions
renders it impossible for LCCR or this Court to determine, in advance, the scope and propriety
of OFAC's assertion of . . . exemptions [2, 4, and 5] as to certain of the information in the
delisting petition”).

2. Categorical Application

Treasury's motion papers and the Fifth Canter Declaration are unclear as to which exemptions it asserts apply categorically to the delisting petitions. Nowhere in Treasury's papers does it specifically identify which exemptions it contends apply categorically. To make things even more confusing, Treasury also asserts that not only do some of the exemptions apply to the entire category of delisting petitions, but certain exemptions also apply to the delisting petitions in their entirety, that is, to every word in every petition, a separate issue which the court discusses in more detail below.

Exemptions 7(A) and 7(F) are the exemptions that Treasury discusses in greatest detail in its papers, and the only ones that it explicitly and unequivocally states apply both categorically and to the petitions in their entirety. See, e.g., Def. Motion at 4, ll. 9-11 ("OFAC determined that Exemptions 7(A) and 7(F) protected each of the delisting petitions in its entirety; and that Exemptions 2, 3, 4, 6, 7(C), and 7(D) also applied to information in the petitions."). In fact, Treasury argues that, for these reasons, the court need not reach the second group of exemptions, and it thus has addressed them in a much more cursory fashion than 7(A) and 7(F).

Other than Exemptions 7(A) and 7(F), the court finds Treasury's papers and arguments both ambiguous and inconsistent regarding which of the exemptions it claims apply categorically. For example, in its opening brief, Treasury cites authority for the proposition that Exemption 3 can be applied categorically, but does not specify or discuss whether it contends that exemption should be applied categorically *in this case*. Moreover, the Fifth Canter Declaration suggests that Treasury is not asserting that Exemption 3 applies categorically. See Def. Motion at 30, ll. 9-10, 34, ll. 4-5; cf. 5th Canter Decl. at ¶ 36 ("OFAC asserted Exemption 3 to protect *certain* Delisting Petitions covered by the . . . [] Kingpin Act."); Def. Motion at 31, l. 7 ("Treasury Properly Invoked Exemption 3 for *Some* Delisting Petitions"); at 4, ll. 9-11.

Yet another example of ambiguity may be found in Treasury's reply, where it notes

1 that “[i]n particular, the *subcategories* of Exemption 7 have been applied to records by
2 category.” Reply at 11, ll. 3-4. Treasury, however, fails to provide authority for applying the
3 other exemptions that it is invoking, including 2, 3, 4, and 6, categorically.⁶ And, again,
4 most significantly, other than Exemptions 7(A) and 7(F), Treasury fails to follow-up and
5 specify in its reply *which* exemptions it contends apply categorically in this case.

6 The Fifth Canter Declaration is no more enlightening. It suggests only that Treasury
7 is seeking to apply Exemptions 7(A) and 7(F) categorically, and offers *no* explanation as to
8 why or whether any of the other exemptions should be applied categorically. See 5th
9 Canter Decl. at ¶ 50 (noting that release of Exemption 7(A) should be applied to both
10 pending and closed delisting petitions because release of any of the petitions would
11 jeopardize investigations and prosecutorial efforts); ¶ 59 (noting that “OFAC determined
12 that *each* of the delisting petitions is subject, in its entirety, to Exemptions 7(A) and 7(F),
13 and that *the other exemptions above also apply to information in some or all of the delisting*
14 *petitions*”) (emphasis added).

15 Given the ambiguity, the court attempted to clarify Treasury’s position at the July 23,
16 2008 hearing. The inquiry unsurprisingly revealed even more inconsistencies in Treasury’s
17 position. At the hearing, Treasury asserted that it was its position that *all* of the
18 exemptions, including non-section 7 exemptions, *may* apply to the petitions *categorically*,
19 but that *only* exemptions 7(A) and 7(F) applied to the petitions both *categorically* and *in*
20 *their entirety*.

21 The court, however, need not resolve the numerous inconsistencies in Treasury’s
22 position because it concludes that Treasury has failed to demonstrate that *any* of the

24 ⁶In its reply, Treasury simply asserts that “[b]ecause Exemptions 7(A) and 7(F) apply
25 to each of the delisting petitions in its entirety, the court need not determine whether other
26 exemptions also apply.” See Reply at 10-12. Then, in summary, Treasury states that it
27 “properly applied the FOIA exemptions to the pending and closed delisting petitions by
28 category of records, rather than on a document-by-document basis.” *Id.* This statement
however is illustrative of the ambiguity in Treasury’s papers in so far as Treasury completely
ignores the fact that it has cited to no authority, and none appears to exist, for applying a
number of the exemptions that it asserts categorically.

1 exemptions may be applied categorically in this case, including exemptions 7(A) and 7(F).

2 Treasury bears the burden to demonstrate that an exemption may be applied
3 categorically, or to a class of documents. *Bevis v. Dept. of State*, 801 F.2d 1386, 1389
4 (D.C. Cir. 1986); *see also In re Department of Justice*, 999 F.2d 1302, 1309 (8th Cir. 1993)
5 (discussing *Bevis* and *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 235-36 (1978)).
6 In order to apply an exemption categorically, there must be some indicia that the individual
7 documents within the class of documents are similar; and that the agency has reviewed
8 and ensured that the individual documents it seeks to include in the class of documents are
9 indeed similar. *See id.*; *see also Campbell*, 682 F.2d at 265; *Institute for Justice v.*
10 *Executive Office*, 1998 WL 164965 at *5-7 (N.D. Cal. 1998). Numerous courts have held,
11 and this court agrees, that proper utilization of the categorical approach requires the
12 agency to: (1) define functional categories of documents; (2) conduct a document-by-
13 document review to assign documents to proper categories; and (3) explain to the court
14 how release of *each category* would interfere with enforcement proceedings. *Id.*; *accord*
15 James T. O'Reilly, Federal Information Disclosure § 7:18 (2000 ed. & 2008 suppl.). Thus,
16 “although [an agency] need not justify *its withholding* on a document-by-document basis in
17 court, the [agency] must itself review each document to determine the category to which it
18 properly belongs.” *Bevis*, 801 F.2d at 1389-90). “Absent individual scrutiny, the categories
19 would be no more than smaller versions of the ‘blanket exemptions’ disapproved of by
20 Congress in its 1974 amendments of FOIA.” *Id.* (quoting *Robbins Tire*, 437 U.S. at 236);
21 *see also Campbell*, 682 F.2d at 265 (“[t]he hallmark of an acceptable . . . category is . . .
22 that it is *functional*; it allows the court to trace a rational link between the nature of the
23 document and the purpose of the exemption”).

24 Treasury seeks to withhold the delisting petitions on a categorical basis, but has
25 failed to make an appropriate showing entitling it to categorical withholding. Treasury has
26 failed entirely to define functional categories of documents. Treasury itself admits that, at a
27 minimum, there are different sub-categories of delisting petitions, for example, open versus
28

1 closed petitions. However, Treasury failed to show that open and closed delisting petitions
2 functionally belong to the same category. See *Bevis*, 801 F.2d at 1389-90. Moreover, the
3 court further finds that Treasury has not shown that the delisting petitions as a whole -
4 whether open or closed – functionally belong to the same category. The delisting petitions
5 reviewed by this court, both with LCCR's opposition to the summary judgment motion and
6 pursuant to this court's order following the hearing, varied significantly, thus defying any
7 conclusion that categorical withholding of the petitions is appropriate, regardless of whether
8 they are open or closed.

9 Moreover, not only did Treasury fail to define functional categories of documents,
10 but it also admittedly did not review all of the delisting petitions that it seeks to withhold to
11 ensure that they were properly categorized. See *id.* In fact, it explains that it reviewed only
12 102 of the 346 petitions to determine which exemptions applied to the documents. See 5th
13 Canter Decl. at ¶ 24. This simply is not sufficient to enable Treasury to conclude that the
14 other 244 petitions should fall into the same category as the 102 that it reviewed. See
15 *Bevis*, 801 F.2d at 1389-90.

16 Furthermore, there is no authority that supports categorical application of several of
17 the exemptions asserted by Treasury - including Exemptions 2, 4, and 6. Existing authority
18 generally supports categorical application of only the Exemption 7 subsections. See
19 *Robbins Tire*, 437 U.S. at 235-36 (allowing categorical application of Exemption 7(A) to
20 witness statements obtained by the NLRB in conjunction with its investigation of
21 defendant's alleged unfair labor practices following a contested representation election);
22 *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749,
23 777-79 (1989) (concluding that a categorical approach was appropriate for Exemption 7(C)
24 as well as 7(A), and holding that rap sheets could be categorically withheld under 7(C));
25 *United States Dep't of Justice v. Landano*, 508 U.S. 165, 178-180 (1993) (suggesting that
26 Exemption 7(D) may also be applied categorically); see also *Lewis*, 823 F.2d at 375
27 (involving Exemption 7(A)); *Lion Raisins*, 354 F.3d at 1072 (same); *In re Department of*
28

1 *Justice*, 999 F.2d at 1308 (discussing pertinent Supreme Court cases). There are,
 2 however, a few cases in which courts, including the Supreme Court, have implied that other
 3 specific exemptions may be applied categorically. See, e.g., *Reporters Comm. for*
 4 *Freedom of the Press*, 489 U.S. at 779 (noting that in *FTC v. Grolier, Inc.*, 462 U.S. 19
 5 (1983), court supported categorical application with respect to Exemption 5)); *Church of*
 6 *Scientology v. Internal Revenue Service*, 792 F.2d 146, 152-53 (D.C. Cir. 1986)
 7 (suggesting that Exemption 3 could be applied categorically under circumstances of that
 8 case).

9 Accordingly, Treasury's motion is DENIED to the extent that it seeks to apply any of
 10 the asserted exemptions categorically to the delisting petitions.

11 3. Section 7 Exemptions Threshold

12 Section 552(b)(7) exempts from disclosure records or information "compiled for law
 13 enforcement purposes," but only to the extent that disclosure will result in one of six
 14 enumerated harms. In determining whether any of the subsections to Exemption 7 apply,
 15 the court must first determine whether the delisting petitions were "compiled for law
 16 enforcement purposes." *John Doe Agency v. John Doe Corporation*, 493 U.S. 146, 152-53
 17 (1989); *Church of Scientology Intern. v. Internal Revenue Service*, 995 F.2d 916, 919 (9th
 18 Cir. 1993).

19 This determination requires "an examination of the agency itself to determine
 20 whether the agency may exercise a law enforcement function." *Church of Scientology*, 611
 21 F.2d at 748. The Ninth Circuit has held that law enforcement agencies such as the FBI
 22 should be accorded special deference in an Exemption 7 determination. See *Binion v. U.S.*
 23 *Dept. of Justice*, 695 F.2d 1189, 1193-1194 (9th Cir. 1983); *Church of Scientology*, 611
 24 F.2d at 748. In the Ninth Circuit, an agency with a clear law enforcement mandate such as
 25 the FBI need establish only a "rational nexus" between its law enforcement duties and the
 26 document for which the Exemption 7 is claimed. *Id.* (citing *Church of Scientology*, 611 F.2d
 27 at 748). An agency can have a "law enforcement purpose" even though it also has another
 28

1 purpose. O'Reilly, *supra* at § 17:9 (noting “the Navy does not have a law enforcement
2 mandate, but it can compile documents for a law enforcement purpose”).
3 An agency with both administrative and law enforcement functions must demonstrate that
4 its purpose in compiling the particular document fell within its sphere of enforcement
5 activity. *Church of Scientology*, 611 F.2d at 748. Information need not have been originally
6 compiled for law enforcement purposes in order to qualify for the “law enforcement”
7 exemption, so long as it was compiled for law enforcement purposes at the time the FOIA
8 request was made. *Lion Raisins*, 354 F.3d at 1081-82 (citing *John Doe*, 493 U.S. at 155).

9 Treasury contends that the section 7 threshold is satisfied because the delisting
10 petitions were compiled for law enforcement purposes. It asserts that OFAC, an office
11 within Treasury’s Office of Terrorism and Financial Intelligence, has been designated by
12 statute as a law enforcement agency. See 31 U.S.C. § 313(a)(6). It notes that OFAC’s
13 functions include combating terrorist financing and offenses threatening the integrity of
14 financial systems. 5th Canter Decl. ¶¶ 12, 45. Specifically, Treasury notes that the SDN
15 list at issue here is a component of the twenty economic sanctions programs that OFAC
16 administers against foreign governments, entities, and individuals. *Id.* at ¶ 16. It attests
17 that “[t]he delisting petitions received by OFAC were received in connection with OFAC’s
18 performance of its law enforcement mission, including the designation process and OFAC’s
19 consideration of delisting. . . .” 5th Canter Decl. ¶ 46.

20 LCCR counters that the threshold for section 7 exemptions is not satisfied because
21 Treasury has not met its burden to show that the delisting petitions were “compiled” for law
22 enforcement purposes. It argues that the fact that the petitions were not “compiled” by
23 OFAC, but were actually compiled by third parties contesting OFAC’s designation, prevents
24 Treasury from satisfying the threshold. LCCR further argues that the delisting petitions are
25 not maintained in order to enforce criminal laws, but for the exact opposite reason: to notify
26 OFAC regarding mistakes in its enforcement.

27 LCCR does not dispute that OFAC has been designated a law enforcement agency.
28

1 Accordingly, there need only be a “rational nexus” between OFAC’s law enforcement duties
2 and the delisting petitions. *Binion*, 695 F.2d at 1193. The court finds that such a nexus
3 exists given that OFAC’s purpose for compiling the petitions is in conjunction with the
4 administration of its sanction-based list programs.

5 The real dispute therefore concerns whether the petitions, typically authored by third
6 parties, may be considered “compiled” for law enforcement purposes. The Supreme
7 Court’s decision in *John Doe* answers this question affirmatively. 493 U.S. at 153. In *John*
8 *Doe*, the Court clarified that “compiled” documents include documents that have been
9 “collected and assembled from various sources or other documents.” *Id.* Thus, even
10 though the delisting petitions were prepared by third parties and maintained and collected
11 by OFAC, they may nevertheless be considered “compiled” by OFAC for purposes of
12 section 552(b)(7), and thus satisfy the threshold test for section 7 exemptions.

13 4. Exemptions 7(A) and 7(F)

14 The court turns first to two of the section 7 exemptions, 7(A) and 7(F), because
15 those are the only two that Treasury clearly contends apply both categorically to all
16 delisting petitions and also each petition in its entirety. As noted, Treasury focuses the
17 majority of its discussion on these two exemptions, and it is also Treasury’s position that
18 the court need only reach these two exemptions. See, e.g., Def. Opening Motion at 1, ll 9-
19 11 (“First, Exemptions 7(A) and 7(F) protect the delisting petitions in their entirety. As a
20 result, although Exemptions 2, 3, 4, 6, 7(C), and 7(D) also protect information in the
21 petitions . . . , the court need not address Treasury’s use of these other exemptions.”).

22 a. Application of Exemptions 7(A) and 7(F) to Documents in their 23 Entirety/ Segregability of Petitions

24 Section 552(b) provides that “[a]ny *reasonably segregable portion of a record* shall
25 be provided to any person requesting such record after deletion of the portions which are
26 exempt.” (Emphasis added). The doctrine of segregability applies to all FOIA exemptions.
27 See *Church of Scientology*, 611 F.2d at 743-44 (holding that it was error for the district
28 court to simply approve the withholding of an entire document that the court had

1 determined was exempt under Exemption 7(D) because it was an investigatory record
2 compiled for law enforcement purposes, without first entering a finding regarding the
3 segregability of non-exempt portions of the document).

4 The burden is on the *agency* to establish that all reasonably segregable portions of a
5 document have been segregated and disclosed. *Pacific Fisheries Inc. v. United States*,
6 593 F.3d 1143, 1148-49 (9th Cir. 2008) (reiterating that “[c]ourts must apply that burden
7 with an awareness that the plaintiff, who does not have access to the withheld materials, is
8 at a distinct disadvantage in attempting to controvert the agency’s claims”). In fact, the
9 Ninth Circuit has held that it is reversible error for the district court “to simply approve the
10 withholding of an entire document without entering a finding on segregability, or the lack
11 thereof,” with respect to that document. *Wiener*, 943 F.2d at 988 (quoting *Church of*
12 *Scientology*, 611 F.2d at 744)). The district court is required “to make a specific finding that
13 no information contained in each document or substantial portion of a document withheld is
14 segregable.” *Id.* Non-exempt portions of a document must be disclosed unless the court
15 finds that they are inextricably intertwined with exempt portions to such a degree that
16 separating the two would “impose significant costs on the agency and produce an edited
17 document with little informational value.” *Willamette Indus., Inc. v. United States*, 689 F.2d
18 865, 867-68 (9th Cir. 1982) (citing *Mead Data Cent., Inc. v. United States Dep't of the Air*
19 *Force*, 566 F.2d 242, 261 (D.C. Cir. 1977)).

20 It is not sufficient for an agency to simply conclude that there is no segregable
21 information without explaining its reasons for such a conclusion. *Mead Data Cent.*, 566
22 F.2d at 261. “[U]nless the segregability provision of FOIA is to be nothing more than a
23 precatory precept, agencies must be required to provide the reasons behind their
24 conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the
25 courts.” *Id.* In addition to a statement of its reasons, an agency should also describe what
26 proportion of the information in a document is non-exempt and how that material is
27 dispersed throughout the document. *Id.* (noting that “[i]f a document itself contains many
28

pages of information, and there are logically divisible sections for which the proportion and distribution description would differ significantly,” the agency should describe the document “by section rather than as a whole”).

For example, if only ten percent of the material is non-exempt and it is interspersed line-by-line throughout the document, an agency claim that it is not reasonably segregable because the cost of line-by-line analysis would be high and the result would be an essentially meaningless set of words and phrases might be accepted. *Id.* On the other extreme, if a large proportion of the information in a document is non-exempt, and it is distributed in logically related groupings, the courts should require a high standard of proof for an agency claim that the burden of separation justifies nondisclosure or that disclosure of the non-exempt material would indirectly reveal the exempt information.

Id.; accord *National Resources Defense Council v. United States Dept. of Defense*, 388 F.Supp.2d 1086, 1096-97 (C.D. Cal. 2005).

In support of its position that the delisting petitions should be withheld in their entirety under these exemptions, Treasury simply asserts that “OFAC determined that there was no reasonably segregable information that could be released.” 5th Canter Decl. at ¶ 59. Nowhere in Treasury’s declarations or its opening or reply papers has it *explained* why segregation is not possible in this case, and why each delisting petition must be withheld in its entirety.

Instead, in its reply, Treasury states in its headings that Exemptions 7(A) and 7(F) “apply to each delisting petition in its *entirety*,” but then completely fails to address the law relevant to the doctrine of segregability, and erroneously makes arguments that are relevant to other issues in its motion, but not to segregability. For example, regarding Exemption 7(A), Treasury confuses the issue of segregability with the *categorical* application of the exemption. See Reply at 7-8 (arguing that “[u]nder Exemption 7(A) as amended, the issue is not whether ‘release of a *particular* document would actually interfere with an enforcement proceeding’ but instead whether ‘disclosure of particular *kinds* of investigatory records’ would ‘generally interfere’ with ‘particular kinds of enforcement proceedings’). However, the inquiry regarding the segregability of exempt and non-exempt material within the documents themselves is not the same as the inquiry

1 regarding whether a class of documents may be withheld. In other words, this court could
2 determine that exemption 7(A) applied categorically to a class of documents, e.g., the
3 delisting petitions, but Treasury would still be required to demonstrate that the “reasonably
4 segregable portions” of the documents within that class of documents had been produced.
5 See, e.g., *Pacific Fisheries*, 593 F.3d at 1148-49. Treasury further confuses the type of
6 showing that an agency is generally required to make in order to withhold documents under
7 exemption 7(A) with the issue of segregability. See Reply at 7-8.

8 Treasury makes a similarly inapposite argument regarding exemption 7(F). See
9 Reply at 9. Again, as with exemption 7(A), instead of addressing the segregability of the
10 petitions, Treasury addresses the type of showing required generally under exemption 7(F).
11 Reply at 9-10. Treasury argues that it need not show the “precise facts” that if disclosed
12 would create a danger to a person’s life or safety. However, that misstates the showing
13 that is required to withhold entire documents. Instead, the showing that Treasury is
14 required to make, and that it ignores, is a showing that it is impossible for it to segregate
15 non-exempt information within the petitions.

16 Treasury’s conclusory assertion that “OFAC determined that there was no
17 reasonably segregable information that could be released,” fails to carry its burden. See
18 *Wiener*, 943 F.2d at 988. To satisfy its burden, Treasury was required to provide the court
19 with its *reasons* - as opposed to its simple conclusion – for its inability to segregate non-
20 exempt portions of the documents, and also to provide the court with a description of “what
21 proportion of the information in a document is non-exempt, and how that material is
22 dispersed throughout the document.” See *Mead Data Cent.*, 566 F.2d at 261. Treasury
23 has provided the court with neither. Accordingly, Treasury’s motion with respect to
24 Exemptions 7(A) and 7(F) generally fails for these reasons, as well as the additional
25 specific reasons that follow.

26 **b. Exemption 7(A): Interference with Enforcement Proceedings**

27 Exemption 7(A) applies to records or information compiled for law enforcement
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purposes, “but only to the extent that the production of such law enforcement records or information *could reasonably be expected to interfere with enforcement proceedings.*” (Emphasis added).

Treasury argues that 7(A) applies to all the delisting petitions, pending and closed. As for the pending delisting petitions, Treasury asserts that disclosure could interfere with law enforcement proceedings because release may: (1) have a chilling effect on the willingness of applicants and/or witnesses and other sources to provide reliable information; (2) reveal the size, scope, and direction of the investigation, enabling targets to destroy or alter evidence and/or tamper with witnesses; (3) could result in the inappropriate or unrestricted use of information by third parties once released; and (4) could impact OFAC’s ability to obtain cooperation from other witnesses and members of networks under investigation. As for the closed delisting petitions, Treasury asserts that disclosure could jeopardize other pending or future investigations.

In support, the Fifth Canter Declaration explains:

49. Release of these Delisting Petitions could have a chilling effect on the willingness of designated persons, witnesses, and other sources to provide the reliable, detailed information that is crucial to OFAC’s consideration of a Delisting Petition. Additionally, the investigation processes used with respect to a delisting determination are in some cases similar to those used for a designation. Disclosing a Delisting Petition prior to completion of OFAC’s review could reveal the direction of the investigation and could result in tampering with witnesses or other informational sources relevant to the inquiry.

50. OFAC determined that release of the Delisting Petitions, whether pending or concluded, would jeopardize the pending investigation and/or any future investigations or prosecutive efforts that have already begun or are anticipated. Once a release is made to a party under the FOIA, his or her use and dissemination of the information to third parties is unrestricted. OFAC also determined that release of these Delisting Petitions that were concluded would jeopardize other pending investigations of related persons or entities and any future investigations or prosecutive efforts that have already begun or are anticipated. OFAC’s designation and delisting processes necessarily involve the investigation of networks of individuals and entities (i.e., familial or business networks) that are closely related. OFAC’s ability to investigate one individual and/or entity and its relationship to a larger network is a key tool of its sanctions programs. For these reasons, OFAC determined that each Delisting Petition, whether pending or concluded, should be withheld in full under Exemption 7(A).

1 LCCR contends that Treasury has improperly categorized the delisting petitions as a
2 whole, should have prepared a Vaughn index as to this exemption, and that Treasury's
3 declaration in support of this exemption is too generalized. LCCR also argues that
4 Treasury has not demonstrated interference with a *specific* pending or contemplated law
5 enforcement proceeding. LCCR contends that with respect to those delisting petitions
6 where enforcement proceedings are pending or are indeed likely to commence, Treasury
7 has not shown that disclosure could reasonably be expected to harm or interfere with those
8 proceedings. It argues that Treasury must make a more particularized showing of harm or
9 interference.

10 In addition to the above conclusions regarding Treasury's failure to make an
11 adequate showing of non-segregability, and its failure to show that it is entitled to
12 categorical application of the exemption to the pending and closed delisting petitions, the
13 court further concludes that Treasury's claim with respect to Exemption 7(A) fails because
14 Treasury has not made a sufficient showing that disclosure of the delisting petitions could
15 reasonably interfere with pending enforcement proceedings.

16 Initially, the court emphasizes that Treasury has repeatedly confused the type of
17 showing required for the categorical application of exemption 7(A) (and, as discussed
18 above, regarding the segregability of exempt information within a particular document), with
19 the type of showing required for application of exemption 7(A) to the petitions generally.
20 These are separate issues. There is no dispute that provided an adequate showing,
21 exemption 7(A) may indeed apply categorically to a class of documents. As noted above,
22 in *Robbins Tire*, the Supreme Court recognized that exemption 7(A) could be invoked
23 categorically. In so holding, it stated that "Congress did not intend to prevent the federal
24 courts from determining that, with respect to particular kinds of enforcement proceedings,
25 disclosure of *particular kinds* of investigatory records while a case is pending would
26 generally 'interfere with law enforcement proceedings.'" 437 U.S. at 236 (emphasis added);
27 accord *John Doe*, 493 U.S. at 156 (quoting *Robbins*, 437 U.S. at 224) ("Congress
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1 recognized that law enforcement agencies had legitimate needs to keep certain records
2 confidential, lest the agencies be hindered in their investigations or placed at a
3 disadvantage when it came time to present their cases.”).

4 The categorical application issue, however, is distinct from the type of showing that
5 Treasury is required to make to demonstrate that Exemption 7(A) applies to the delisting
6 petitions generally. In order to withhold documents pursuant to 7(A), the agency must
7 establish “that disclosure of those documents would interfere with pending enforcement
8 proceedings.” *Lion Raisins*, 354 F.3d at 1081-82 (quoting *Lewis*, 823 F.2d at 379). The
9 Ninth Circuit has held that the agency must explain “*in detail* . . . how releasing each of the
10 withheld documents would interfere with the government’s ongoing criminal investigation.”
11 *Id.* at 1084 (emphasis added). “The submission must provide as much factual support for
12 [the agency’s] position as possible without jeopardizing the government’s legitimate law
13 enforcement interest in withholding the documents, and it must be ‘detailed enough for the
14 district court to make a de novo assessment of the government’s claim of exemption.’” *Id.*
15 (quoting *Maricopa Audubon Soc’y*, 108 F.3d at 1092).

16 In *Lion Raisins*, the Ninth Circuit reversed the district court where the plaintiff, an
17 independent handler of California raisins, sought to obtain under FOIA, documents related
18 to the USDA’s criminal investigation of it. The USDA withheld investigative reports
19 prepared by the Agricultural Marketing Services of the USDA (“AMS”) and the Office of the
20 Inspector General (“OIG”) under Exemption 7(A). The district court granted summary
21 judgment to the USDA, and the Ninth Circuit reversed and remanded to the district court
22 with instructions to require submission of detailed public declarations, testimony, or other
23 material in support of its claim that Exemption 7(A) applied to the documents. *Id.* at 852.
24 The court held that the sole affidavit from the AUSA in support of the USDA’s claimed
25 exemption was not sufficient. *Id.*; see also *Lewis*, 823 F.2d at 378 (generalized affidavits
26 are not sufficient to establish a 7(a) exemption).

27 Contrary to Treasury’s arguments otherwise, the Ninth Circuit’s holding in *Lion*
28

1 *Raisins* regarding the type of showing necessary under 7(A) comports with FOIA law
2 generally, and also with the 1986 amendments to FOIA (which the court notes *preceded*
3 the court's decision in *Lion Raisins*). A leading treatise recognizes that:

4 Analysis under the 1986 amendments may proceed in two parts. While there
5 is an active proceeding, the exemption will apply, but courts will have to apply
6 a two-step test of finding a proceeding which investigated a particular target
7 and then deciding if it is reasonable to believe that interference could occur.
8 The affidavit should show *either a concrete proceeding or one which is*
9 *legitimately in prospect*. A concrete prospective law enforcement proceeding
10 must be established by the agency. There must be a reasonable chance of
11 an enforcement proceeding.

12 James T. O'Reilly, Federal Information Disclosure § 17:18, Burdens of Proof (2000 ed.);
13 see also *id.* at § 17:141 (June 2008 suppl.) (citing *Lion Raisins* regarding detail required
14 with respect to agency's factual showing).

15 Had Treasury indeed properly categorized all of the delisting petitions in this case,
16 which the court has concluded that it did not, it is true that it would not have been
17 necessary for Treasury to make the detailed showing set forth in *Lion Raisins* with respect
18 to *each individual delisting petition*. See *Lewis*, 823 F.2d at 380 (discussing *Robbins Tire*,
19 437 U.S. at 224-25); *Bevis*, 801 F.2d at 1389-90. However, Treasury was still required, at
20 a minimum, to make the type of particularized showing set forth by the Ninth Circuit in
21 *Lewis* and in *Lion Raisins* with respect to any appropriate *category* of documents. Even if
22 the court were to assume that the delisting petitions were properly categorized in this case,
23 it finds that Treasury has nevertheless failed to make a sufficient showing that the category,
24 e.g., the delisting petitions, are covered by Exemption 7(A).

25 The conclusory Fifth Canter Declaration is inadequate in this respect. The
26 declaration does not enable the court to conclude that disclosure of the delisting petitions
27 could reasonably interfere with a pending law enforcement action. Specifically, the
28 declaration does not explain *how* disclosure of the petitions is likely to jeopardize other
pending proceedings. It also fails to describe the harm that would allegedly result from
third parties' possession of the information in the petitions. Significantly, the potential
"chilling effect" and related consequences that Treasury asserts might result from

disclosure are also speculative and unsupported by an adequate explanation or rationale. See, e.g., *City of Chicago v. United States Dept. of Treasury*, 287 F.3d 628, 634 (7th Cir. 2002), *opinion amended on other grounds*, 297 F.3d 672 (7th Cir. 2002) (rejecting agency's claimed exemption under 7(A) where potential for interference with law enforcement action was merely speculative). In sum, the conclusory, unsupported statements will not suffice to make the requisite showing, as set forth in *Lewis* and *Lion Raisins*. Because the Fifth Canter Declaration does not provide the court with sufficient detail to make an independent assessment of the government's claim of exemption, and for all of the above reasons, Treasury's motion for summary judgment as to Exemption 7(A) is DENIED.

c. Exemption 7(F): Endangering life or physical safety

Exemption 7(F) includes records or information compiled for law enforcement purposes, "but only to the extent that the production of such law enforcement records or information *could reasonably be expected to endanger the life or physical safety of any individual.*" (Emphasis added).

Treasury argues that it may categorically withhold the petitions under 7(F) because to require it to specify its objections in greater detail would require disclosure of the very information that Treasury seeks to withhold. Regarding Exemption 7(F), the Fifth Canter Declaration provides:

The release of the delisting petitions would reasonably be expected to expose individuals (including the applicant but also other individuals who have provided statements and/or other information pursuant to a delisting petition or are mentioned in the petition) to threats against their life and would endanger their physical safety. Such danger is presented by the mere fact that an individual applied for delisting as others may infer by such action that such individual has provided information related to his or her associates.

Cantor Decl. ¶ 58.

In support of its argument that 7(F) applies here, Treasury cites to *Brunetti v. FBI*, a district court case out of the D.C. Circuit. 357 F.Supp.2d 97, 109 (D.D.C. 2004). In *Brunetti*, a prisoner who was convicted of numerous RICO violations in connection with his activities with the La Cosa Nostra organization, propounded a FOIA request for all FBI

1 records that referenced him. *Id.* The FBI withheld four documents in their entirety that
2 related to individuals or informers who cooperated with the FBI in obtaining his conviction.
3 *Id.* The district court held that 7(F) applied, and agreed with the FBI that “given the violent
4 nature of the La Cosa Nostra organization, the individuals could be endangered as a result
5 of their cooperation with the FBI against [the prisoner] and the organization if their identities
6 were to be made known.” *Id.* Treasury argues that this court, like the *Brunetti* court,
7 should similarly defer to OFAC’s assessment regarding danger to individuals.

8 LCCR responds that OFAC cannot withhold all of the delisting petitions in their
9 entirety under 7(F). In an argument relevant to segregability, LCCR argues that OFAC has
10 not set forth a single reason why *redactions* in particular documents would not be sufficient
11 to satisfy 7(F). LCCR even concedes that such redactions may be appropriate, but notes
12 that it is impossible to know which redactions would be appropriate given that Treasury has
13 not provided a Vaughn index.

14 LCCR further notes that OFAC has publicly identified the delisted individuals and
15 entities on its website and in press releases, and argues that such disclosure is a greater
16 threat to the lives and safety of the individuals than disclosure pursuant to LCCR’s FOIA
17 request. LCCR also suggests that OFAC’s endangerment concerns are pretext, and that it
18 is really attempting to shield itself from the adverse publicity that may ensue if mistakes
19 regarding its SDN list are exposed. In support, it cites to a case in which a district court
20 held that photographs and videotapes possessed by Department of Defense (DOD)
21 depicting abuse of detainees in Guantanamo Bay and Iraq, when redacted, were not
22 exempted from production under 7(F). *American Civil Liberties Union v. Department of*
23 *Defense*, 389 F.Supp.2d 547 (S.D.N.Y. 2005). The court held that the photographs did not
24 qualify for the exemption in spite of the government’s argument that their production would
25 incite violence against troops. *Id.* The court reasoned that the publication of the
26 photographs was central to purposes of FOIA because they initiated debate about improper
27 and unlawful conduct of “rogue” soldiers and command structure that failed to exercise
28

1 discipline over the troops. *Id.*

2 For the reasons set forth above, the court concludes that Treasury has not
3 demonstrated that it is entitled to categorically withhold all of the delisting petitions under
4 7(F). Moreover, like Exemption 7(A), the court further concludes that even if Treasury
5 could categorically withhold the documents under this exemption, the Fifth Canter
6 Declaration is similarly inadequate to demonstrate that Treasury is entitled to withholding
7 under 7(F).

8 Unlike the other section 7 exemptions, there is a dearth of circuit law, Ninth Circuit or
9 otherwise, regarding exemption 7(F). Nevertheless, looking at other persuasive authority, it
10 is clear that in order to qualify for the 7(F) exemption, an agency must establish *non-*
11 *conclusory* reasons why disclosure of a category of withheld documents would reasonably
12 be expected to endanger the life or physical safety of any individual. See *Los Angeles*
13 *Times Communications, LLC v. Department of Army*, 442 F.Supp.2d 880, 898-900 (C.D.
14 Cal. 2006) (emphasis added). One district court from this circuit has summarized, and this
15 court agrees, that

16 [t]he test is not whether the court personally agrees in full with the [agency's]
17 evaluation of the danger-rather, the issue is whether on the whole record the
18 Agency's judgment objectively survives the test of reasonableness, good
faith, specificity, and plausibility in this field of foreign intelligence in which the
[Agency] is expert and given by Congress a special role.

19 *Id.*

20 Although existing case law does support affording a fair degree of deference to the
21 agency in its Exemption 7(F) determination, this deference is not without limits. As with
22 Exemption 7(A), conclusory, unsupported statements will not suffice. Treasury's affidavit
23 must enable the court to understand its basis for arriving at its conclusion. It does not do
24 so in this case. Treasury's assertion regarding danger to an applicant upon release of the
25 delisting petitions is nothing more than unsupported speculation, and for this reason, the
26 court DENIES summary judgment as to Exemption 7(F) as well .

27 Although the court DENIES Treasury's motion as it pertains to Exemptions 7(A) and
28 7(F), the court notes that there may be a cognizable basis for redacting certain *portions* of

1 some of the petitions under 7(A) and 7(F), including the identities of sources and witnesses.

2
3 However, because the court finds that Treasury is not entitled to relief under
4 Exemptions 7(A) and 7(F) – the exemptions that Treasury contended mooted the need for
5 review of the other six asserted exemptions – the court indeed has found it necessary to
6 address the other exemptions as well, and has done so below.

7 **5. Exemptions 6 and 7(C): Invasion of Privacy**

8 Treasury also seeks to withhold information contained within the delisting petitions
9 under Exemptions 6 and 7(C).

10 Exemption 7(C) protects *law enforcement records* whose disclosure "could
11 reasonably be expected to constitute an *unwarranted invasion of personal privacy*." 5
12 U.S.C. § 552(b)(7)(C) (emphasis added). Similarly, Exemption 6 protects "*personnel and*
13 *medical files and similar files* the disclosure of which would constitute a *clearly unwarranted*
14 *invasion of personal privacy*." 5 U.S.C. § 552(b)(6) (emphasis added). Although they are
15 somewhat similar, the Supreme Court has repeatedly emphasized that there is significance
16 in the different language used in the two exemptions. Exemption 6's requirement of a
17 "clearly unwarranted" invasion is more difficult for the government to meet than 7(C)'s
18 "unwarranted" invasion. See *FBI v. Abramson*, 456 U.S. 615, 629 (1982); *Department of*
19 *Air Force v. Rose*, 425 U.S. 352, 378-79 n.16 (1976); see also *Rosenfeld v. United States*
20 *Dep't of Justice*, 57 F.3d 803, 812 (9th Cir. 1995) (stating that exemption 6 requires a
21 showing of a more intrusive invasion of privacy than exemption 7(C)); *Hunt v. F.B.I.*, 972
22 F.2d 286, 288 (9th Cir. 1992) (stating that exemption 6 is not co-extensive with exemption
23 7(C)). Accordingly, the threshold for withholding under 7(C) is lower than under Exemption
24 6. See *id.*; see also O'Reilly, Federal Information Disclosure at § 17:67.

25 Under exemption 7(C), the agency need only show that disclosure could
26 reasonably be expected to constitute an unwarranted invasion of privacy. *Rosenfeld*, 57
27 F.3d at 812 (noting that exemption 6 requires a showing of a more intrusive invasion of
28

1 privacy than exemption 7(C)). In determining under Exemption 7(C) whether the
2 production of responsive law enforcement records or information could “reasonably be
3 expected to constitute an unwarranted invasion of personal privacy,” the public interest in
4 disclosure of the responsive information must be weighed against the privacy interests. *Id.*

5 The Supreme Court has defined “similar file,” as used by Exemption 6 broadly as
6 government records containing “information which applies to a particular individual.” *Minnis*
7 *v. Dept. of Agriculture*, 737 F.2d 784, 786 (9th Cir. 1984) (quoting *United States Dep’t of*
8 *State v. Washington Post Co.*, 456 U.S. 595, 602 (1982)). Exemption 6 is intended to
9 protect individuals from the injury and embarrassment that can result from the unnecessary
10 disclosure of personal information. *Bowen v. U.S. Food & Drug Admin.*, 925 F.2d 1225,
11 1228 (9th Cir. 1991); see also *Dobronski v. F.C.C.*, 17 F.3d 275 (9th Cir. 1994) (applying
12 exemption 6 to sick leave records); *Van Bourg, Allen, Weinberg & Roger v. N.L.R.B.*, 728
13 F.2d 1270, 1273 (9th Cir. 1984) (applying Exemption 6 to names and addresses of
14 employees eligible to vote for a union). To determine whether Exemption 6 applies, the
15 court balances four factors: (1) the plaintiff's interest in disclosure; (2) the public interest in
16 disclosure; (3) the degree of the invasion of personal privacy; and (4) the availability of any
17 alternative means of obtaining the requested information. *Church of Scientology*, 611 F.2d
18 at 746; see also *Van Bourg*, 728 F.2d 1270 at 1273 (setting forth same factors).

19 In balancing the privacy interests, “[t]he sole cognizable public interest for FOIA is
20 the interest to open agency action to the light of public scrutiny, to inform the citizenry
21 about what their government is up to.” *Rosenfeld*, 57 F.3d at 811. The Ninth Circuit has
22 held that there may be a strong public interest in revealing the names of the subjects
23 investigated by law enforcement agencies. *Id.* at 811-12.

24 The parties disputed several legal issues in their papers, including the parties’
25 burdens with respect to Exemption 6, and the impact of prior publication of information
26 contained in the petitions. Specifically, Treasury argued in its motion papers that it is
27 LCCR’s burden under Exemption 6 to demonstrate that disclosure of the personal
28

1 information would serve the public interest and would outweigh the privacy interests of the
2 third parties. This, however, is not the case. The burden remains on the agency to justify
3 any withholdings under Exemption 6 since the presumption in favor of disclosure under this
4 exemption is as strong as that with other exemptions. See *News-Press v. United States*
5 *Dept. of Homeland Sec.*, 489 F.3d 1173, 1198 (11th Cir. 2007); O'Reilly, Federal
6 Information Disclosure § 16:25 (citing *National Ass'n of Home Builders v. Norton*, 309 F.3d
7 26, 32 (D.C. Cir. 2002)). In fact, federal courts, have generally concluded that an agency's
8 burden under Exemption 6 of showing that disclosure would constitute a clearly
9 unwarranted invasion of personal privacy is an "onerous" one. *News-Press*, 489 F.3d at
10 1198 (citing several other circuit court cases).

11 Additionally, LCCR argued that the information contained in the petitions is not
12 private because OFAC has already publicly identified the individuals and entities seeking
13 delisting as "global terrorists." However, contrary to LCCR's argument, the Ninth Circuit
14 has held that simply because certain documents that would normally be subject to
15 Exemptions 7(C) and Exemption 6 have already been publicized does not mean they must
16 be disclosed by the agency. *Fiduccia v. United States Dep't of Justice*, 185 F.3d 1035,
17 1046-47 (9th Cir. 1999). That is because a person may still have a privacy interest in
18 information that has already been publicized. *Id.* Nor is one's privacy interest in potentially
19 embarrassing information lost by the possibility that someone could reconstruct that data
20 from public files. *Id.*

21 Moreover, the Ninth Circuit has also held that an individual has a privacy interest in
22 "not being associated unwarrantedly with alleged criminal activity." *Schiffer v. F.B.I.*, 78
23 F.3d 1405, 1410 (9th Cir. 1996). The fact that the public may already be aware of the
24 allegations does not lessen one's privacy interest. *Lane*, 523 F.3d at 1137. Where an
25 agency is able to establish that the privacy interests of third parties will be implicated, the
26 requestor must show that "the public interest sought to be advanced is a significant one"
27 and that "the information [sought] is likely to advance that interest." *Id.* (quoting *Favish*,

1 541 U.S. at 172).

2 Treasury concedes that neither Exemption 6 nor 7(c) apply to the delisting petitions
3 in their entirety. Accordingly, it is Treasury's burden to demonstrate to *which* portions of
4 the petitions Exemptions 6 and 7(C) indeed apply. In order for the court to make such a
5 determination, a Vaughn index is required. Treasury, however, chose not to submit a
6 Vaughn index, thus failing to demonstrate the information that these exemptions applied to,
7 and did so presumably because it believed that it was entitled to judgment based on
8 Exemptions 7(A) and 7(F). Having determined, though, that is not the case, the court is
9 unable to resolve the applicability of the above exemptions absent a Vaughn index, and for
10 this reason, summary judgment as to Exemptions 6 and 7(C) is DENIED. Additionally, for
11 the reasons set forth above, the court concludes that Treasury has not demonstrated that it
12 is entitled to categorically withhold of all of the delisting petitions under either Exemption 6
13 or 7(C).

14 However, the court does not find the claim of exemption to be entirely without merit.
15 Undoubtedly the petitions contain some private information that should not be disclosed.
16 Considering the fact that LCCR concedes that certain information should be redacted from
17 the petitions under these exemptions, and the substantial judicial resources already
18 expended on this FOIA request, the court concludes that the most appropriate next step is
19 to require the parties to meet and confer regarding the scope of Exemption 6 and 7(C)
20 redactions to the delisting petitions. At this meet and confer, the parties should attempt to
21 resolve the *types* of information that Treasury may redact under these exemptions. If the
22 parties are able to come to such an agreement, that will likely alleviate the need for
23 Treasury to prepare an index in conjunction with the meet and confer. However, in the
24 event that the parties are unable to agree on the types of information that may be redacted
25 pursuant to these exemptions, then an index will be necessary to enable the parties and
26 the court if necessary to determine which portions of the documents are indeed segregable.

6. Exemption 7(D): Confidential Sources

Treasury also seeks to withhold information contained within the delisting petitions under Exemption 7(D), which protects information that would disclose the identity of a confidential source. In accordance with Exemption 7(D), a source is “confidential” if he “provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.” *Rosenfeld*, 57 F.3d at 814 (quoting *Landano*, 508 U.S. at 165). The focus, therefore, is not whether “the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential.” *Id.* “The confidentiality determination depends on the circumstances under which the subject provided the requested information.” *Id.*

Treasury argues that in order to facilitate its SDN-related investigations, it must obtain cooperation from sources under either an express or an implied promise of confidentiality, and that without such confidentiality, the sources would not cooperate for fear of retribution against themselves and/or their families. LCCR concedes that to the extent *actual* confidential sources exist – including paid informants and certain confidential witnesses - and are named in the documents, it would not object to redactions of this information, but that it is impossible to determine the necessary redactions without a Vaughn index.

LCCR is correct that there can be no presumption of *implied* confidentiality to sources that provided information in the course of an agency investigation. *Rosenfeld*, 57 F.3d at 814-15 (discussing *Landano*, 505 U.S. at 1212). In *Rosenfeld*, a case decided following the Supreme Court’s decision in *Landano*, the Ninth Circuit affirmed the district court’s decision denying summary judgment to the FBI on the applicability of Exemption 7(D). *Id.* It rejected the government’s argument that sources mentioned in FBI documents had received express assurances of confidentiality where there was no evidence in the record that sources had indeed received such express assurances. *Id.* Similarly, the court

1 rejected that government's argument that FBI sources inherently receive a promise
2 confidentiality. *Id.*

3 The court DENIES summary judgment regarding Exemption 7(D) for the same
4 reasons as those set forth above with respect to Exemptions 6 and 7(C), and also orders
5 the parties to meet and confer under the same conditions as those set forth above.
6 Additionally, as set forth above, the court concludes that this exemption may not be applied
7 to the petitions categorically.

8 7. Exemption 2

9 Treasury further seeks to withhold information contained within the delisting petitions
10 under Exemption 2, which protects matters that are "related solely to the internal personnel
11 rules and practices of an agency." Exemption 2 protects from FOIA disclosure "matters
12 that are . . . related solely to the internal rules and practices of an agency." 5 U.S.C. §
13 552(b)(2). It protects internal information, the disclosure of which would risk circumvention
14 of a legal requirement ("high 2" information), in addition to internal information of a less
15 significant nature, such as administrative routing notations and agency rules and practices
16 ("low 2" information).

17 The Ninth Circuit has held that Exemption 2 excludes from disclosure "law
18 enforcement materials, disclosure of which may risk circumvention of agency regulation."
19 *See Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 656 (9th Cir. 1980).
20 "Law enforcement' materials involve methods of enforcing the laws, however interpreted."
21 *Id.* at 657. "Materials that solely concern law enforcement are exempt under Exemption 2 if
22 disclosure may risk circumvention of agency regulation." *Id.*

23 In opposition, LCCR simply states that OFAC's failure to provide a Vaughn index or
24 to make a particularized showing as to the contents of the individual delisting petitions
25 renders it impossible for LCCR or the court to determine the scope and propriety of this
26 exemption.

27 The court DENIES summary judgment regarding Exemption 2 for the same reasons
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1 as those set forth above with respect to Exemptions 6 and 7(C), and also orders the parties
2 to meet and confer under the same conditions as those set forth above. Additionally, as
3 set forth above, the court concludes that this exemption may not be applied to the petitions
4 categorically.

5 **8. Exemption 3**

6 Treasury additionally seeks to withhold information contained in the petitions under
7 Exemption 3. That exemption, which permits the withholding of matters specifically
8 exempted from disclosure by another statute, applies where such statute (A) requires that
9 the matters be withheld from the public in such a manner as to leave no discretion on the
10 issue, or (B) establishes particular criteria for withholding or refers to particular types of
11 matters to be withheld. 5 U.S.C. § 552(b)(3). Specifically, Treasury argues that
12 information contained in the delisting petitions is exempt from disclosure under Exemption
13 3(B) in conjunction with the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§ 1901-
14 1908 ("the Kingpin Act").

15 Under Exemption 3, the government must show that the statute on which it relies
16 qualifies as an exempting statute and that the material being withheld falls within the
17 exempting statute's coverage. *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 960 F.2d 105,
18 108 (9th Cir. 1992). The Ninth Circuit has held that "only explicit nondisclosure statutes . . .
19 will be sufficient to qualify under the exemption." *Id.* (quoting *Church of Scientology v. U.S.*
20 *Postal Service*, 633 F.2d 1327, 1329 (9th Cir. 1980)).

21 LCCR responds that OFAC's failure to provide a Vaughn index or to make a
22 particularized showing as to the contents of the individual delisting petitions renders it
23 impossible for LCCR or the court to determine the scope and propriety of Exemption 3. It
24 additionally argues that the delisting petitions were not obtained for the purpose of
25 enforcing the Kingpin Act, but instead were prepared and obtained to protest the Act's
26 enforcement for individuals and entities claiming that they were not actually kingpins.

27 Again, the court DENIES summary judgment for the same reasons as those set forth
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1 above with respect to Exemptions 6 and 7(C), and also orders the parties to meet and
2 confer under the same conditions as those set forth above. The court notes that although
3 the applicability of the Kingpin Act presents a legal issue for the court, it is unable to resolve
4 the issue given the fact that Treasury has not provided it with a Vaughn index and/or further
5 explanation regarding which petitions, and which information contained in the petitions, are
6 indeed covered by the Kingpin Act. That information is necessary before the court can
7 make even the legal determination regarding the Act's applicability. Additionally, as set
8 forth above, the court concludes that this exemption may not be applied to the petitions
9 categorically.

10 **9. Exemption 4**

11 Treasury also argues that information in the petitions is protected under Exemption
12 4, which applies to "trade secrets and commercial or financial information obtained from a
13 person [that is] privileged or confidential." Exemption 4 is available to prevent disclosure of
14 (1) commercial and financial information, (2) obtained from a person or by the government,
15 (3) that is privileged or confidential. *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d
16 1109, 1112 (9th Cir. 1994). Information qualifies as "confidential" for the purposes of
17 Exemption 4 if disclosure is likely to have either of the following effects: "(1) to impair the
18 Government's ability to obtain necessary information in the future; or (2) to cause
19 substantial harm to the competitive position of the person from whom the information was
20 obtained." *Id.*

21 Treasury contends the exemption applies to certain portions of the petitions that
22 contain the petitioners' commercial and/or financial information that, if made public, could
23 result in fraud and/or identity theft. In response, LCCR again simply states that OFAC's
24 failure to provide a Vaughn index or to make a particularized showing as to the contents of
25 the individual delisting petitions renders it impossible for LCCR or the court to determine
26 the scope and propriety of Exemption 4.

27 The court DENIES summary judgment for the same reasons as those set forth
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1 above with respect to Exemptions 6 and 7(C), and also orders the parties to meet and
2 confer under the same conditions as those set forth above. Additionally, as set forth
3 above, the court concludes that this exemption may not be applied to the petitions
4 categorically.

5 **C. LCCR's Request for Judicial Notice**

6 LCCR filed a request that the court judicially notice pursuant to Federal Rule of
7 Evidence 201 certain documents attached to its supporting declarations, which were filed in
8 other district court cases. Among those documents are several delisting petitions.
9 Treasury has objected - not because the documents are of the type that may not be
10 judicially noticed - but on the basis of relevance. Additionally, Treasury argues that while
11 this court may take judicial notice that the documents were filed, it may not judicially notice
12 the facts contained in those documents.

13 The court OVERRULES Treasury's objections. The court may judicially notice under
14 Rule 201 the fact that the documents are part of another court's records, were filed in the
15 course of those proceedings, and that certain assertions were made in the documents, but
16 may not judicially notice the truth of the statements or assertions contained in those
17 documents. *See Lee v. County of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).
18 Given the fact that Treasury failed to submit a Vaughn index, and also given the fact that
19 Treasury seeks to treat the delisting petitions categorically, the court further finds that the
20 judicially noticed documents are indeed relevant, at a minimum, to the court's assessment
21 of the type of information contained in a delisting petition, and whether delisting petitions are
22 unique and/or may be treated categorically for purposes of the exemptions asserted by
23 Treasury.

24 **CONCLUSION**

25 For the reasons set forth above, the court DENIES Treasury's motion for summary
26 judgment, and ORDERS disclosure of the delisting petitions, subject to the parties meeting
27 and conferring regarding the scope of the appropriate redactions as required above
28

1 pursuant to exemption 2, 3, 4, 6, 7(C), and 7(D). The parties should meet and confer in
2 good faith and make every effort to agree upon the appropriate redactions. Given the
3 amount of judicial resources already expended on this case, the court STRONGLY
4 encourages the parties to resolve the only remaining issue – the scope of the redactions. If
5 the parties are unable to resolve this issue, they should notify the court immediately.
6 However, before the court will further address any dispute regarding redactions, Treasury is
7 advised that it will be required to prepare and submit a comprehensive Vaughn index. The
8 court will not revisit the applicability of exemptions 7(A) and 7(F), although Treasury may
9 redact names of witnesses and sources from the petitions.

10 The parties shall notify the court no later than **November 3, 2008** by joint status
11 statement, whether they have agreed upon the redactions or whether yet another briefing
12 schedule is required.

13 **IT IS SO ORDERED.**

14
15 Dated: September 30, 2008



16
17
18 PHYLIS J. HAMILTON
United States District Judge